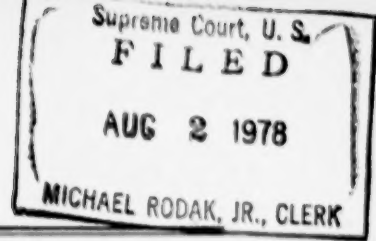


NO. 78-38



**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,**

Petitioners,

vs.

LEROY FOUST,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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The Respondent, Leroy Foust, respectfully submits that no basis exists for this Court to exercise its discretion, pursuant to Rule 19, Rules of the United States Supreme Court for the granting of a Petition for a Writ of Certiorari.

INTRODUCTION

Respondent accepts Petitioners' Statement of Jurisdiction, questions presented, and Statement of the Case with only minor exceptions to the Statement of the Case.

In its Petition at page 5, Petitioner alleges that punitive damages were for "breach of contract" by the Brotherhood. A brief review of the case indicates that such an allegation is simply not supported. In its instruction to the jury on the issue of punitive damages, the Trial Court gave the following instruction to the jury:

"In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind not only the conditions under which, and the purpose for which, the

law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case."

REASONS FOR DENYING WRIT

Petitioner has set forth three areas in which it alleges this Court ought to exercise its discretion in granting Petitioners' Petition for Writ of Certiorari. Respondent will deal with each of them as they appear in Petitioner's Petition by corresponding Roman Numeral.

I.

THE DECISION BELOW DOES *NOT* CONFLICT WITH THE DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS TO BE USED IN DETERMINING WHETHER A COLLECTIVE BARGAINING REPRESENTATIVE HAS BREACHED ITS DUTY OF FAIR REPRESENTATION OWED TO A MEMBER OF THE BARGAINING UNIT

The Trial Court's instruction, affirmed by the Court of Appeals, was almost a direct quote from *Vaca v. Sipes*, 386 U.S. 171. Petitioner suggests that a different standard than that enunciated in *Vaca v. Sipes* should have been imposed, and refers this Court to *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274 as an example of that different standard. A studied examination of *Lockridge* indicates that the duty of the union to represent its members was not at issue in the case. Indeed, the Court stated that it was unnecessary to determine whether or not a breach of the duty of fair representation occurred in *Lockridge*, 403 U.S. 299, 300. This Court determined that the Idaho Supreme Court had correctly stated, as had the Trial Court, that this case involved one of the Union's duty under a contract.

Each of the other cases, including *Humphrey v. Moore*, 375 U.S. 335 and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 are totally consistent with the standard set forth by this Court in *Vaca v. Sipes*.

Since the Trial Court's instruction to the jury was virtually a quote from *Vaca* (See Petition, p. 7a-9a) and since the Court of Appeals explained its holding in relation to the dicta of *Amalgamated Association of Motor Coach Employees v. Lockridge*, Supra, and viewed the decision of this Court in *Vaca v. Sipes*, Supra, in light of the Court's statements in *Hines v. Anchor Motor Freight, Inc.*, Supra, the claim of inconsistency in the opinion of the Court of Appeals with the decisions of this Court simply cannot stand. The decision of the Tenth Circuit Court of Appeals is entirely consistent with the holdings of this Court in relation to the duty of fair representation owed to a member of a bargaining unit by the recognized collective bargaining agent and there is no basis for the exercise of this Court's discretion in granting of a Petition for Writ of Certiorari in the instant case.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS IN PROCEDURES TO BE USED IN THE OCCASION OF DAMAGES IN A FAIR REPRESENTATION CASE INVOLVING AN ALLEGED WRONGFUL DISCHARGE

The decision of this Court in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, 430 U.S. 290, lays to rest any claim of inconsistency between the decision of the Court of Appeals, and the decisions of this Court in relation to the issue of damages raised in Petitioner's Petition. *Conley v. Gibson*, 355 U.S. 41, *Vaca v. Sipes*, Supra, *Czosek v. O'Mara*, 397 U.S. 25.

The decisions of the Courts of Appeals which are almost parenthetically claimed to be inconsistent with the decision of

the Court below support the identical result as was reached by both Courts below. *Balowski v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), AFL-CIO*, 372 F.2d 829 (6th Cir. 1967), *Ruzicka v. General Motors Co.*, 523 F.2d 306 (6th Cir. 1975); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4th Cir. 1966), *Cert. Den.* 386 U.S. 960.

Clearly, the decision below, in light of the applicable decisions of this Court, is not in conflict with the decisions of this Court in relation to the allocation of damages in a fair representation case.

III.

THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT ON THE ASSESSABILITY OF EXEMPLARY DAMAGES AGAINST A BARGAINING REPRESENTATIVE IN FAIR REPRESENTATION CASES

This Court decided in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 that it was up to the Federal Trial Courts to fashion remedies which deal with the problems raised in these types of so-called labor relations cases. A broad range of discretion was left to the Trial Courts in fashioning such remedies, and that policy has been carried forward in the decisions of this Court relating to the duty of fair representation cases referred to in Petitioners' Petition. Indeed, the issue was laid to rest in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, Supra, and the decision of the Court below, although not relying on *Farmer* was entirely consistent with the holding of this Court in relation to the issue of punitive damages.

There is no conflict between the decision of the Court below and the opinions of the Fourth Circuit in *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *Cert. Den.* 425 U.S. 958 (1976) or *Emmanuel v. Omaha*

Carpenters District Council, 560 F.2d 382 (8th Cir. 1977). See also *Butler v. Local Union 823, International Brotherhood of Teamsters*, 514 F.2d 442 (8th Cir. 1975).

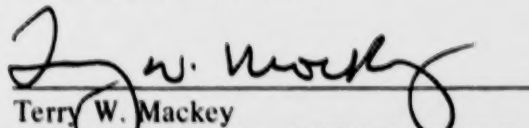
CONCLUSION

There is simply no basis for this Court to exercise its discretion under Rule 19 of the Rules of the United States Supreme Court, and grant Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit Court of Appeals opinion is entirely consistent with the decisions of other Circuit Courts, and shows a great deal of insight in sorting the wheat from the chaff to reach a consistent position with the decisions of this Court in applying the law to the facts.

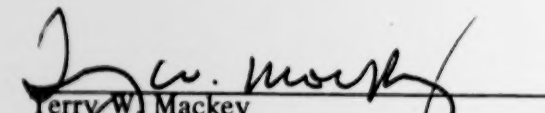
Petitioner admits in his Petition that the instructions to the jury given by the Trial Court were a correct statement of the law. Petitioner only has quarrel with the application of that law to the facts as presented to the jury. Thus, having failed to persuade the Trial Court and having failed to persuade the Court of Appeals, Petitioner attempts to paint a picture of conflict with a broad brush. No such conflict exists, either with the decision of this Court or with the decisions of the various Courts of Appeal, and Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Terry W. Mackey, of Urbigkit, Mackey & Whitehead, P.C. hereby certifies that on the 31 day of July, 1978, he served a true and correct copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit by mailing a copy thereof to William J. Hickey and Edward J. Hickey, Jr., of Mulholland, Hickey, Lyman, McCormick, Fisher & Hickey, 1125 Fifteenth Street, N.W., Suite 400, Washington, D.C. 20005 and depositing same in the United States Post Office at Cheyenne, Wyoming, postage prepaid.


Terry W. Mackey
of Urbigkit, Mackey & Whitehead, P.C.